

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Core Communications, Inc. |) | WC Docket No. 03-171 |
| |) | |
| Petition for Forbearance Under |) | |
| 47 U.S.C. § 160 (c) From Application |) | |
| of the ISP Remand Order |) | |

REPLY COMMENTS OF CORE COMMUNICATIONS, INC.

Core Communications, Inc. ("Core"), by its attorneys, hereby submits these Reply Comments in support of its Petition for Forbearance ("Petition") filed with the Federal Communications Commission (the "Commission") in the above-captioned proceeding. For the reasons discussed herein, the Commission is compelled to exercise its forbearance authority under Section 10 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 160, and accordingly, to forbear from further application of the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order*.¹

I. INTRODUCTION AND SUMMARY

The Petition filed by Core in this proceeding clearly demonstrates that the intercarrier compensation provisions of the *ISP Remand Order*, as applied to the exchange of ISP-bound traffic between carriers, unreasonably discriminates against competitive local exchange carriers ("CLECs"), on one hand, in favor of the Bell Operating Companies ("BOCs"), and on the other hand, in favor of a distinct class of CLECs that commenced telecommunications

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98) and *Inter-carrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68), Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001), *remanded without vacatur, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*").

operations prior to the arbitrarily-selected effective date the of the Commission's interim regime. The disparate impact of the *ISP Remand Order* on new telecommunications businesses undoubtedly has chilled competitive market entry in a manner that is wholly inconsistent with the policy goals of the Act, and in turn, has limited the availability of innovative service options to telecommunications consumers. Accordingly, the forbearance relief requested by Core is appropriate, and in fact compelled by the plain language of the Act.

The initial comments filed by the BOCs in this proceeding offer nothing more than a blanket denial of Core's claims, and an unimpressive restatement of the BOCs' manufactured, stale "regulatory arbitrage" rhetoric. First, the BOCs dispute the obvious anticompetitive harm and financial distress disproportionately suffered by new market entrants that are precluded entirely from collecting reciprocal compensation for terminating traffic to their end user customers that are ISPs. Second, the BOCs shift blame for the disastrous effects of the *ISP Remand Order* on CLECs to the CLECs themselves, suggesting that the disparities occurring under the Commission's interim intercarrier compensation regime for ISP-bound traffic must be the result of flawed business planning by the CLECs, and not result of flawed reasoning by the Commission. Of course, the BOCs collectively refuse to acknowledge that the profitability of their own business plans fundamentally depend on their on-going ability to collect billions of dollars in intercarrier compensation payments from interexchange carriers and other local exchange carriers. At bottom, the BOCs make no credible claim to refute that the Commission's on-going application of the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* would harm the interests of telecommunications carriers and consumers.

Rather ironically, the BOCs also deny that the Petition filed by Core in this proceeding satisfies the statutory requirements for exercise of the Commission's forbearance authority under Section 10 of the Act. To the contrary, Core's request for forbearance relief is entirely consistent with any reasonable application of Section 10 to the *ISP Remand Order*, and moreover, the Commission's grant of Core's Petition is not otherwise foreclosed by the same deficiencies suffered by the BOCs' recent Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Platform.² Of further importance, unlike the pricing rules at issue in the BOCs' forbearance petition, the rules promulgated under the *ISP Remand Order* currently are sheltered from review on their merits. Accordingly, this is the only forum in which the Commission may review the anticompetitive effects of the interim intercarrier compensation regime for ISP-bound traffic, and the ruinous impact of the *ISP Remand Order* on CLECs and the competitive telecommunications industry. As required by Section 10 of the Act, the Commission must exercise its forbearance authority where, as here, the on-going application of the Commission's existing rules is harmful to the public interest.

II. CORE'S PETITION CLEARLY SATISFIES THE REQUIREMENTS FOR EXERCISE OF THE COMMISSION'S FORBEARANCE AUTHORITY UNDER SECTION 10

As required by Section 10 of the Act, the Petition for Forbearance filed by Core in this proceeding clearly demonstrates that the Commission's rules promulgated under the *ISP Remand Order* are not necessary to prevent unjust or unreasonable discriminatory treatment of telecommunications carriers, nor to protect the interests of telecommunications consumers. To the contrary, Core has shown that the Commission's application of the interim intercarrier

² See *In the Matter of Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc. and SBC Communications Inc. For Expedited Forbearance From the Commission's Current Pricing Rules*, WC Docket No. 03-189 (filed Jul. 31, 2003); *In the Matter of Petition of the Verizon Telephone Companies For Expedited Forbearance From the Commission's Current Pricing Rules*, WC Docket No. 03-157 (filed Jul. 1, 2003).

compensation regime for ISP-bound traffic has placed new market entrants at a crippling competitive disadvantage as compared to the ubiquitous, rate-payer-financed BOCs, and in fact, has provided the BOCs a prominent opportunity to maximize the amount of the intercarrier compensation payments that they collect, and to minimize the amount of intercarrier compensation payments that they make to CLECs. In turn, the regulatory environment created by the *ISP Remand Order* has deterred financial investment in new telecommunications businesses, chilled new market entry, and stifled product and service innovation, all to the detriment of telecommunications consumers. The relief requested by Core would remove a substantial barrier to competition among providers of telecommunications services, and accordingly, the Commission's exercise of its forbearance authority under Section 10 of the Act is entirely consistent with the public interest.

A. The Commission's Application Of Its Rules Promulgated Under the *ISP Remand Order* Is Not Necessary To Prevent Unjust Or Unreasonable Discriminatory Treatment Of Telecommunications Carriers

The Petition filed by Core in this proceeding clearly demonstrates that the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* is not necessary to prevent unjust or unreasonable discriminatory treatment of telecommunications carriers, and in fact, is the source of regulatory disparities that severely disrupt competitive market conditions. On its face, the *ISP Remand Order* permits the BOCs to unilaterally determine the intercarrier compensation rates applicable to all traffic, and accordingly to maximize the amount of intercarrier compensation payments that they collect, and to minimize the amount of intercarrier compensation payments that they make to CLECs. Moreover, the effective date of the growth cap and new market bar provisions promulgated under the *ISP Remand Order* arbitrarily requires new market entrants to recoup their terminating

switch costs only from their end user customers, or to absorb those costs entirely, while at the same time permitting the BOCs and a small number of CLECs to recover such costs through reciprocal compensation payments. In spite of the Commission's efforts to achieve a different result, the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* blatantly discriminates among telecommunications carriers in manner wholly inconsistent with the policy goals of the Act.

In opposing Core's Petition, the BOCs note only that the *ISP Remand Order* requires payment of reciprocal compensation for termination of ISP-bound traffic at the same rates, and pursuant to the same terms, for all carriers.³ However, the so-called "mirroring rule" permits the BOCs to unilaterally determine the intercarrier compensation rates applicable to ISP-bound traffic, and to all other traffic exchanged pursuant to Section 251(b)(5) of the Act.⁴ Under the *ISP Remand Order*, CLECs are accorded no similar opportunity to select or even to negotiate such intercarrier compensation rates, and accordingly must accept those rates established at the whim of the BOCs. As demonstrated by Core's Petition,⁵ and by the Comments of Consumer Advocate of the West Virginia Public Service Commission,⁶ the "mirroring rule" presents a prominent opportunity to "game" or otherwise "arbitrage" the *ISP Remand Order*. Indeed, there can be no doubt that the BOCs have used their "superior bargaining position" to further their market dominance and to block competitive entry into local telecommunications markets.⁷

³ See Opposition of Verizon at 6.

⁴ See *ISP Remand Order* at ¶ 89.

⁵ See Petition at 2, 6.

⁶ See Comments of the Consumer Advocate of the West Virginia Public Service Commission at 7, 10, 11-14.

⁷ *ISP Remand Order* at ¶ 89.

The comments filed by the BOCs in this proceeding also suggest that the new market bar and growth cap provisions promulgated under the *ISP Remand Order* do not arbitrarily discriminate among telecommunications carriers, but at the same time concede that certain carriers acted in reliance on reciprocal compensation revenues and thus are not similarly situated to carriers who were not exchanging traffic pursuant to interconnection agreements on the effective date of the interim intercarrier compensation regime.⁸ However, as demonstrated by Core's Petition, the Commission critically discounted the substantial financial investments made by CLECs prior to the Commission's implementation of the *ISP Remand Order*, on the basis of sound business plans, and with the reasonable expectation that CLECs would continue to recoup their operating costs and maintain their profitability through the collection of reciprocal compensation for termination of traffic to their end user customers that are ISPs.⁹ It would appear that the BOCs, which enjoy full use of their rate-payer-financed, embedded networks, are willing to ignore the flawed reasoning that plagues the interim intercarrier compensation regime, and instead to search for some ulterior motive underlying the legitimate business plans of carriers that do not serve "other customers" in the same way that "Verizon and others do."¹⁰

In this proceeding, Verizon has the audacity to argue that Core offers no evidence to support its claim that Core reasonably expected to recoup a portion of its initial financial investment through the collection of reciprocal compensation.¹¹ The Commission already has concluded that Verizon unreasonably delayed Core's request for interconnection in the Washington Metropolitan LATA, submitted to Verizon in *February 2000*, for a period of *four*

⁸ See Opposition of SBC Communications Inc. at 4.

⁹ See Petition at 8.

¹⁰ See Opposition of Verizon at 7.

¹¹ *Id.* at 8.

months, during which Verizon's own traffic "continued to flow freely."¹² Moreover, Core demonstrated to the Commission in its Petition for Waiver of the Growth Cap/New Market Bar in Delaware, New York, and Pennsylvania that Core's requests for interconnection with Verizon for the Philadelphia, Pittsburgh, and New York City markets, also dating back to *February 2000*, were delayed as long as *fourteen months*, and thus were not completed until after the effective date of the Commission's *ISP Remand Order*.¹³ With respect to Core, Verizon's pronounced efforts to unreasonably prolong interconnection for the purpose of delaying new market entry is clear – and the anticompetitive result of Verizon's conduct is perpetuated by the *ISP Remand Order*.

In attempting to discredit Core's claims that the on-going application of the interim intercarrier compensation regime for ISP-bound traffic has produced widespread anticompetitive harm, the BOCs rely heavily on the "regulatory arbitrage" rhetoric echoed by the Commission throughout the *ISP Remand Order* to suggest that the Commission has reasonably selected the lesser of two evils.¹⁴ However, in spite of the Commission's efforts to achieve a different result, the interim intercarrier compensation regime for ISP-bound traffic has provided the BOCs a multitude of new opportunities for regulatory arbitrage.¹⁵ Now, over two years following the Commission's adoption of the *ISP Remand Order*, the BOCs continue to collect literally billions of dollars in intercarrier compensation payments using their embedded, rate-

¹² *Core Communications, Inc. v. Verizon Maryland Inc.*, File No. EB-01-MD-007, Memorandum Opinion and Order at ¶ 19 (rel. Apr. 23, 2003).

¹³ *See In the Matter of Petition of Core Communications, Inc. for Waiver of the Growth Cap/New Market Bar in Delaware, New York and Pennsylvania*, CPD Docket No. 01-20 (filed Aug. 17, 2001), Core-Verizon Interconnection Timeline attached hereto as **Exhibit A**.

¹⁴ *See* Opposition of BellSouth Corporation at 6-7, 10-12; Opposition of Qwest Communications International Inc. at 2-4, 10-12; Opposition of SBC Communications Inc. at 1-3, 4; Opposition of Verizon at 3-4, 8-9, 10-11.

¹⁵ *See* Petition at 2.

payer-financed plant, while new entrants are denied the ability to recover similarly the cost of their investments.

B. Continued Application Of The Commission's *ISP Remand Order* Rules Is Not Necessary For The Protection of Consumers

The Petition filed by Core in this proceeding clearly demonstrates that the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* is not necessary for the protection of consumers, and in fact, has produced anticompetitive harms that have limited the innovative, competitively-price telecommunications service options available to consumers.¹⁶ As noted above, and as discussed more fully in Core's Petition, the growth cap and new market bar provisions of the *ISP Remand Order* entirely preclude new market entrants from collecting reciprocal compensation for terminating traffic to their ISP customers, and accordingly, requires such carriers to recoup their terminating switch costs only from their end users or to absorb them entirely.¹⁷ As a result, the telecommunications services offered to consumers by new market entrants are made available only at higher prices than those offered by the BOCs, or are otherwise limited by the higher operating costs that such service providers must endure.¹⁸ Moreover, the inability of new market entrants to offer competitively priced telecommunications services to consumers has deterred financial investment essential to the development of new telecommunications businesses, and thus has chilled competitive entry into local telecommunications markets, diminished the availability of telecommunications service options available to consumers, and slowed the pace of telecommunications service and product innovation.¹⁹

¹⁶ See Petition at 10-11.

¹⁷ See *id.* at 5-6.

¹⁸ See *id.*

¹⁹ See *id.* at 8-9, 10-11.

C. The Commission's Forbearance From Further Application Of Its Rules Promulgated Under The *ISP Remand Order* is Consistent With The Public Interest

The Petition filed by Core in this proceeding clearly demonstrates that the Commission's forbearance from further application of the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* is entirely consistent with the public interest, and will enhance competition among providers of telecommunications services. Indeed, Core's Petition illustrates, in great detail, the manner in which the discriminatory treatment of CLECs under the *ISP Remand Order* has chilled new market entry, diminished competition in local telecommunications markets, and deterred investment in new telecommunications businesses. At bottom, the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* is a substantial barrier to the development of competitive market conditions, and a substantial impediment to achieving the policy objectives of the Act. Accordingly, for the reasons set forth in Core's Petition and discussed herein, Core submits that the Commission's forbearance from further application of the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order* would enhance competition among providers of telecommunications services, as is consistent with the public interest.

D. The Petition Filed By Core In This Proceeding Does Not The Same Deficiencies As The BOCs' Petition For Forbearance From The Current Pricing Rules For The Unbundled Network Element Platform

The Petition filed by Core in this proceeding does not suffer the same deficiencies as the BOCs' Petition For Forbearance From The Current Pricing Rules For The Unbundled

Network Element Platform recently filed with the Commission.²⁰ The Commission's grant of the Petition filed by Core in this proceeding is entirely consistent with Section 10 of the Act, and is not subject to any limitation thereunder. The issues of law raised by Core's Petition currently are not before the Commission as part of any notice-and-comment rulemaking proceeding, and are not otherwise under review by the Commission or by any court. Accordingly, the Commission's grant of the Petition filed by Core in this proceeding is not precluded by the Act or by the Commission's rules, and is not otherwise inconsistent with the public interest.

The Commission's forbearance from further application of its rules promulgated under the *ISP Remand Order* is not subject to limitation under Section 10(d) of the Act, which provides that "the Commission may not forbear from applying the requirements of Section 251(c) or 271...until it determines that those requirements have been fully implemented."²¹

Unlike the Commission's TELRIC pricing rules for unbundled network elements at issue in the BOCs' Petition,²² the rules promulgated under the *ISP Remand Order* do not implicate any of the requirements set forth in Section 251(c) or Section 271 of the Act. Accordingly, the Commission's forbearance from further application of its rules promulgated under the *ISP Remand Order* is not similarly barred under Section 10(d) of the Act.

²⁰ See *In the Matter of Joint Petition of Qwest Corporation, BellSouth Telecommunications, Inc. and SBC Communications Inc. For Expedited Forbearance From the Commission's Current Pricing Rules*, WC Docket No. 03-189 (filed Jul. 31, 2003); *In the Matter of Petition of the Verizon Telephone Companies For Expedited Forbearance From the Commission's Current Pricing Rules*, WC Docket No. 03-157 (filed Jul. 1, 2003).

²¹ 47 U.S.C. § 160(c).

²² The Commission's TELRIC pricing rules are essential to requirements of Section 251(c) and Section 271 of Act, both of which require that the BOCs provide CLECs nondiscriminatory access to unbundled network elements. However, the Commission has not yet determined that these requirements of the Act have been fully implemented by the BOCs. Accordingly, the BOCs' request that the Commission forbear from further application of the TELRIC pricing rules to the unbundled network element platform is barred under Section 10(d) of the Act.

The D.C. Circuit's remand of the *ISP Remand Order* currently is not expressly subject to review as part of any notice-and-comment rulemaking proceeding before the Commission, and in fact, as discussed more fully below, the "interim regime" is sheltered entirely from review by any court. To the contrary, the TELRIC pricing rules at issue in the BOCs' Petition are the focus a Notice of Proposed Rulemaking recently issued by the Commission, and accordingly will be reviewed as part of a complete notice-and-comment rulemaking proceeding.²³ Accordingly, unlike the TELRIC pricing rules, the merits of the Commission's rules promulgated under the *ISP Remand Order* would not otherwise be subject to any meaningful review by the Commission outside of this proceeding.

III. THE DECISION OF THE D.C. CIRCUIT IN *WORLDCOM V. FCC* FULLY SUPPORTS THE COMMISSION'S EXERCISE OF ITS FORBEARANCE AUTHORITY IN THIS PROCEEDING

The Petition filed by Core in this proceeding notes that the D.C. Circuit already has rejected the Commission's proclaimed statutory basis for the interim intercarrier compensation regime promulgated under the *ISP Remand Order*.²⁴ Importantly, the Court did not address the merits of the *ISP Remand Order*, but instead remanded the *ISP Remand Order* to the Commission, and directed that the Commission identify a suitable statutory basis for its efforts prior to any consideration of those rules on the merits.²⁵ The Commission's utter passivity in response to the D.C. Circuit's remand has foreclosed any meaningful review of the *ISP Remand Order* to which aggrieved parties, such as Core, are entitled. As noted by MCI, Section 402 of the Act, 47 U.S.C. § 402(h), expressly requires that the Commission "carry out

²³ See *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (rel. Sep. 15, 2003).

²⁴ See Petition at 3-4; see also *Worldcom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

²⁵ See *Worldcom*, 288 F.3d at 434.

the judgment of the court.”²⁶ Nonetheless, the Commission has permitted the interim intercarrier compensation regime promulgated under the *ISP Remand Order* to remain in full force and effect for eighteen months following the D.C. Circuit’s remand in *Worldcom*, and appears nowhere near addressing the statutory basis for its rules, which the Commission must articulate before the D.C. Circuit will consider the merits of the Commission’s ostensibly interim regime. As such, the interim intercarrier compensation regime currently is sheltered from any substantive review in that proceeding. Thus, this is the only forum in which the parties adversely affected by the Commission’s application of the *ISP Remand Order* may obtain the substantive review of Commission’s rules to which they are legally entitled.

IV. CONCLUSION

For the foregoing reasons, the Commission is compelled to exercise its forbearance authority under Section 10 of the Act, and accordingly, to forbear from further application of the interim intercarrier compensation regime for ISP-bound traffic promulgated under the *ISP Remand Order*.

Respectfully submitted,

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September 22, 2003

²⁶ See Comments of MCI at 1.

EXHIBIT A

CORE-VERIZON INTERCONNECTION TIMELINE

| | |
|----------------------|---|
| 1999 | Core begins substantial investment for implementation of its business plan in Delaware, New York and Pennsylvania. |
| February 2000 | Core requests interconnection with Verizon in Philadelphia. |
| June 2000 | Core requests interconnection with Verizon in Pittsburgh and New York City. |
| March 2001 | Core files complaint with FCC regarding Verizon's failure to complete interconnection in D.C. LATA. |
| April 2001 | FCC issues <i>ISP Remand Order</i> – growth cap and new market bar apply for all carriers that were not exchanging traffic pursuant to an interconnection agreement prior to April 18, 2001 . |
| April 2001 | 14 months after Core's request, Verizon completes interconnection with Core in Philadelphia. Core begins to offer service in Philadelphia. |
| June 2001 | 12 months after Core's request, Verizon completes interconnection with Core in Pittsburgh and New York City. Core begins to offer service in Pittsburgh and New York City. |
| April 2003 | FCC grants Core's interconnection complaint against Verizon. FCC finds that Verizon unlawfully delayed interconnection with Core in the D.C. LATA by 4 months – implicitly finds that interconnection should have been completed in 5 months, and not in 9 months . |